SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1933

No. 419

GLOBE INDEMNITY COMPANY, PETITIONER,

vs.

THE UNITED STATES OF AMERICA TO THE USE OF STEACY-SCHMIDT MANUFACTURING COMPANY, INCORPORATED

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

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IN UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF PENNSYLVANIA

DOCKET ENTRIES

1928.

Oct. 17th. Præcipe to issue summons filed.
17th. Summons Exit Returnable 1st Monday in November, 1928.
17th. Statement of Claim filed.
17th. Notice to file affidavit of defense filed.
24th. Petition for and order of court directing service of notice of suit filed.
27th. Subpœna returned; "Sanitation Corporation not found, on Oct. 22nd served A. B. Bielaski, Receiver, and Globe Indemnity Company", and filed.
31st. Præcipe to issue alias summons filed.
Alias summons exit Returnable 1st Monday in November, 1928.
Nov. 5th. Appearance of Ballard, Spahr, Andrews and Madeira for Globe Indemnity Co., filed.
Nov. 7th. Affidavit of defense of Globe Indemnity Co. and New Matter filed. Notice to reply to new matter filed.
20th. Alias summons returned: "on November 2nd served" and filed.

1930.

May 23rd. Petition for requisition on Comptroller General to furnish certified copies of certain papers and decree granting petition filed.
June 21st. Certified photostat copy of certificate of settlement 0165447 filed.

[fol. 2]

Oct. 8th. Præcipe to place case on trial list filed.

1931.

Jan. 9th. Præcipe to place case on trial list filed.
Mar. 17th. Answer by plaintiff to New Matter filed.
May 29th. Agreement of counsel to try case before the court without a jury; to amend statement of claim, to amend affidavit of defense, etc. filed.

1932.

Mar. 21st. Trial before court without a jury.
Apl. 8th. Testimony filed.
July 15th. Opinion, Kirkpatrick, J., granting leave to enter judgment in favor of defendant filed.
July 27th. Præcipe to enter judgment in favor of Globe Indemnity Co. defendant filed.
27th. Judgment in favor of Globe Indemnity Co. defendant filed.
28th. Exceptions and order of court allowing exceptions filed.
Oct. 17th. Petition for and order of Court allowing appeal filed.
18th. Assignments of error filed.
19th. Bond sur appeal, in $250, with U. S. Fidelity & Guaranty Company, surety, and order of Court approving bond, filed.
20th. Citation allowed and issued.
20th. Copy of notice of appeal filed.
25th. Citation returned, service accepted, and filed.
Nov. 2nd. Præcipe for transcript of record sur appeal filed.
" " Agreement of counsel as to certification of stenographer's record of trial filed.

[fol. 3]

" 5th. Plaintiff's requests for findings of fact, etc. filed.
" 5th. Defendant's requests and findings of fact and conclusions of law filed.

IN UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA, SEPT. SESSION, 1928

No. 14222

THE UNITED STATES OF AMERICA to the Use of STEACY-SCHMIDT MANUFACTURING COMPANY, INCORPORATED, and Such Other Creditors of the Sanitation Corporation, Defendant Herein, as May be Entitled to Join in This Suit,

vs.

THE SANITATION CORPORATION, Incorporated under the Laws of the State of Delaware; A. Bruce Bielaski, Receiver in Bankruptcy of the said Sanitation Corporation, Defendant Herein, and Globe Indemnity Company, Incorporated under the Laws of the State of New York

STATEMENT OF CLAIM OF STEACY-SCHMIDT MANUFACTURING COMPANY—Filed Oct. 17, 1928

The plaintiff, Steacy-Schmidt Manufacturing Company, a corporation organized and existing under and by virtue of the laws of the Commonwealth of Pennsylvania, claims to recover from the Sanitation Corporation, incorporated under the laws of the State of Delaware; A. Bruce Bielaski, [fol. 4] Receiver in Bankruptcy of the said Sanitation Corporation, defendant herein, and the Globe Indemnity Company, incorporated under the laws of the State of New York, the sum of Six Thousand Two Hundred Fifty ($6,250.00) Dollars, with interest thereon from February 25th, 1927, upon a cause of action of which the following is a statement.

(1) That heretofore and on or about May 29th, 1926, the defendant, The Sanitation Corporation, entered into a formal contract with the United States of America for the prosecution and completion of a public work, to wit, the furnishing of two 48" needle valves which the United States of America required for installation in the Umatilla (McKay Dam) Irrigation Project.

(2) That a true and complete copy of the said contract between said defendant, The Sanitation Corporation, and the United States of America is hereto attached, marked Exhibit "A" and hereby made a part hereof.

(3) That in and by the terms and conditions of said contract between said defendant, The Sanitation Corporation, and the United States of America the same was to be completed by the delivery of said needle valves by the said defendant, The Sanitation Corporation, to the United States of America "F. O. B. Cars, Catasauqua, Pennsylvania" which is within the Eastern District of Pennsylvania.

(4) That in and by the terms and conditions of said contract between said defendant, The Sanitation Corporation, and the United States of America, the latter agreed to pay to said defendant, The Sanitation Corporation, for said [fol. 5] needle valves the sum of Twelve Thousand Five Hundred ($12,500.00) Dollars.

(5) That in accordance with the terms and conditions of said contract between said defendant, The Sanitation Cor-

poration, and the United States of America, and as required by the Act of Congress, commonly known as the Heard Act (Sec. 270 United States Code; Act of Congress of August 13th, 1894, Ch. 280, 28 Stat. 278 as amended by the Act of February 24th, 1905, Ch. 778, 33 Stat. 811; and by the Act of March 3rd, 1911, Ch. 231, Sec. 291, 36 Stat. 1167) said defendant, the Sanitation Corporation, was required to execute a penal bond with good and sufficient sureties in the sum of Six Thousand Two Hundred Fifty ($6,250.00) Dollars to the effect that said defendant, The Sanitation Corporation, would promptly make payment to all persons supplying it with labor and materials in the prosecution of the work provided for in said contract between said defendant, The Sanitation Corporation, and the United States of America, and that thereupon and accordingly said defendant, The Sanitation Corporation, as principal, and said defendant, The Globe Indemnity Company, as surety, did, in accordance with said contract and said Acts of Congress, execute and deliver their certain bond dated June 8th, 1926, of which a true and complete copy is hereto attached, marked Exhibit "B" and hereby made a part hereof.

(6) That at the request of said defendant, The Sanitation Corporation, said plaintiff supplied said defendant, The Sanitation Corporation, with labor and materials in the prosecution of the work provided for in said contract between said defendant, The Sanitation Corporation, and [fol. 6] the United States of America and that at the request of said defendant, The Sanitation Corporation, said plaintiff manufactured said needle valves and/or caused the same to be manufactured and on behalf of and at the request of the said defendant delivered the same to the United States of America which accepted and used said needle valves as hereinafter set forth, and that said defendant, The Sanitation Corporation, promised and agreed to pay to said plaintiff therefor the sum of Fifteen Thousand Two Hundred Five ($15,205.00) Dollars. That the valves, labor and materials furnished by the plaintiff to the defendant, The Sanitation Corporation, as aforesaid were necessary for, and were actually used in the prosecution, carrying out and completion of said contract between the defendant, The Sanitation Corporation, and the United States of America, and that the same were duly accepted

by the defendant, The Sanitation Corporation, and by the United States of America and used in the Project aforesaid.

(7) That the completion and final settlement of said contract between the Defendant, The Sanitation Corporation, and the United States of America, occurred on or about October 29, 1927, at which time the United States of America made final settlement, and that payment to said Defendant, The Sanitation Corporation, under said contract and for said valves took place on or about November 5, 1927.

[This paragraph is printed as amended. See agreement of counsel, page 29.]

(8) On account of the said sum of Fifteen Thousand Two Hundred Five ($15,205.00) Dollars there was paid on [fol. 7] account on June 1st, 1928, the sum of Two Thousand Seventy Dollars and Thirty Cents ($2,070.30) leaving a balance due of Thirteen Thousand One Hundred Thirty Four Dollars and Seventy Cents ($13,134.70) due for the price of the said valves, labor and materials furnished as aforesaid by the plaintiff to the defendant, The Sanitation Corporation, which said balance has not been paid to the said plaintiff although demand therefor has been made upon the said Sanitation Corporation, defendant, and payment refused. Plaintiff further avers that demand has been duly made on the defendants herein for the payment of the sum of Six Thousand Two Hundred Fifty $6,250.00) Dollars, and interest thereon, under the terms of the said bond, and payment thereof was refused by the said defendants.

(9) That no suit has been brought by the United States of America against either of the defendants upon said contract or upon said bond and that more than six (6) months have elapsed since the completion and final settlement of said contract between the defendant, The Sanitation Corporation, and the United States of America, and that the plaintiff, in accordance with the Statutes hereinabove referred to, has been furnished with a certified copy of said contract and said bond.

(10) That a petition in involuntary bankruptcy was filed against the Sanitation Corporation, defendant, in the

United States District Court for the Southern District of New York on September 20th, 1928, and in the said proceedings A. Bruce Bielaski was duly appointed receiver and qualified for the said office in accordance with the order of the said court.

[fol. 8] (11) The plaintiffs, Steacy-Schmidt Manufacturing Company, claim of the defendants and each and all of them the sum of Six Thousand Two Hundred Fifty ($6,250.00) Dollars, together with interest thereon from February 25th, 1927.

Samuel W. Cooper, Attorney for Plaintiff.

Duly sworn to by John J. Cadot. Jurat omitted in printing.

(Exhibits "A" and "B" are printed as a part of the notes of testimony, the contract at page 23 and the bond at page 25.)

[fol. 9] IN UNITED STATES DISTRICT COURT

AFFIDAVIT OF DEFENSE OF GLOBE INDEMNITY COMPANY, ONE OF THE DEFENDANTS ABOVE NAMED—Filed Nov. 7, 1928

STATE OF PENNSYLVANIA,
County of Philadelphia, ss:

M. A. Craig, being duly sworn according to law, deposes and says that he is Vice President of the Globe Indemnity Company, one of the above named defendants, and authorized to make this affidavit on its behalf; that Globe Indemnity Company has a just, true and complete defense to the whole of plaintiff's claim of the following nature and character, to wit:

1. This defendant admits the averments of paragraph 1 of the Statement of Claim.

2. This defendant admits the averments of paragraph 2 of the Statement of Claim except that the copy of the contract mentioned therein and attached to the Statement as Exhibit "A" is not complete in that the schedule of adver-

tisement and the specifications No. 447 referred to in said contract are not set forth in the copy so displayed as Exhibit "A".

3. This defendant admits the averments in paragraph 3 of the Statement of Claim.

4. This Defendant admits the averments in paragraph 4 of the Statement of Claim.

5. This Defendant admits the averments in paragraph 5 of the Statement of Claim.

6. This Defendant admits the averments in paragraph 6 of the Statement of Claim.

[fol. 10] 7. This Defendant admits that the United States of America made final payment to the defendant, The Sanitation Corporation, under the said contract for the said valves on or about November 5, 1927. This Defendant denies that final settlement of the said contract between the defendant, The Sanitation Corporation, and the United States of America occurred on or about October 29th, 1927, and to the contrary avers that such final settlement was made on or about June 16, 1927, and prior to October 17, 1927, by the fixing administratively by the proper Governmental authorities of the United States of America of the amount which the United States of America was finally bound to pay to the defendant, The Sanitation Corporation, under said contract.

[This paragraph is printed as amended. See agreement of counsel, page 29.]

8. This Defendant admits the averments in paragraph 8 of the Statement of Claim.

9. This Defendant admits the averments in paragraph 9 of the Statement of Claim.

10. This Defendant admits the averments in paragraph 10 of the Statement of Claim.

11. This Defendant denies that there is due the plaintiff from this defendant the amount of $6,250.00, together with interest thereon from February 25, 1927, or any other amount whatsoever.

NEW MATTER

For further defense and by way of new matter, Defendant avers:

[fol. 11] 1. That on or about June 16, 1927, and prior to October 17, 1927, final settlement was made under the aforesaid contract between the defendant, The Sanitation Corporation, and the United States of America, by the fixing administratively by the proper governmental authorities of the United States of America of the amount which the United States of America was finally bound to pay to the defendant, The Sanitation Corporation, under said contract, and that this suit was not commenced until October 17, 1928, which was after the expiration of the period of one year from and after the date of final settlement under the said contract as aforesaid, and that therefore, under the provisions of the Act of Congress, commonly known as the Hurd Act (Sec. 270, U. S. Code; Act of Congress Aug. 13, 1894, Ch. 280, 28 Stat. 278, as amended by the Act of Feb. 24, 1905, Ch. 778, 33 Stat. 811), the right of the plaintiff to bring suit upon the bond mentioned in the Statement of Claim as aforesaid has lapsed and that the plaintiff is without right to have or maintain this action against this Defendant and any and all liability of this Defendant to the plaintiff has ceased and determined.

(Sgd.) M. A. Craig.

Sworn to and subscribed before me this 7th day of November, 1928. My commission expires March 6th, 1931. (Sgd.) Wm. R. Spofford, Notary Public.

[fol. 12] IN UNITED STATES DISTRICT COURT

ANSWER OF STEACY-SCHMIDT MANUFACTURING COMPANY, INCORPORATED, TO THE NEW MATTER AS SET FORTH IN THE AFFIDAVIT OF DEFENSE OF THE GLOBE INDEMNITY COMPANY, INCORPORATED—Filed Mar. 17, 1931

In Answer to the new matter set forth in the Affidavit of Defense filed by the Globe Indemnity Company, Steacy-Schmidt Manufacturing Company, Incorporated, plaintiffs herein, deny that on or about June 16th, 1927, final settle-

ment was made under the contract between the defendant, The Sanitation Corporation, and the United States of America, by fixing administratively by the proper governmental authorities of the United States of America of the amount which the United States of America was finally bound to pay to the defendant, The Sanitation Corporation; under the said contract and the plaintiffs aver that the said administrative settlement of the amount due was not made until October 26th, 1927; and final payment thereon was made on November 5th, 1927, and the plaintiffs aver that the suit upon the said bond was brought within the proper time, as fixed by the Hurd Act and the amendments thereto and that the defendant is liable to the plaintiff for the amount claimed in this action.

John J. Cadot, Treasurer.

Duly sworn to by John J. Cadot. Jurat omitted in printing.

[fol. 13] IN UNITED STATES DISTRICT COURT

Statement of Evidence

Before Hon. William H. Kirkpatrick, J.

Philadelphia, Pa., Monday, March 21, 1932.

Present:

Samuel W. Cooper, Esq., and Russell C. Gourley, Esq., for Plaintiff;

Frederic L. Ballard, Esq., for Defendant.

PLAINTIFF'S EVIDENCE

Mr. Cooper: If Your Honor pleases, this is a case brought to recover the sum of $6,250.00 from the Globe [fol. 14] Indemnity Company, who were the bondsmen on a Government contract under the Heard Act. The facts in the case are developed by the admissions and agreements of counsel, so that there are no witnesses orally to be examined. I will read the statements in the statement of

claim, and have my associate, Mr. Gourley, read the answers, so that we can have those properly on the record.

First—

The Court: Pardon me, may I have the file in the case? Yes, I have it here, it is all right.

Mr. Cooper: One, this is:

"That heretofore and on or about May 29th, 1926, the defendant, The Sanitation Corporation, entered into a formal contact with the United States of America for the prosecution and completion of a public work, to wit, the furnishing of two 48" needle valves which the United States of America required for installation in the Umatilla (McKay Dam) Irrigation Project."

Mr. Gourley: The affidavit of defense, paragraph 1:

"This defendant admits the averments of paragraph 1 of the Statement of Claim."

Mr. Cooper: 2:

"That a true and complete copy of the said contract between said defendant, The Sanitation Corporation, and the United States of America is hereto attached, marked Exhibit 'A' and hereby made a part hereof."

Mr. Gourley: Paragraph 2 of the affidavit of defense:

[fol. 15] "This defendant admits the averments of paragraph 2 of the Statement of claim except that the copy of the contract mentioned therein and attached to the Statement as Exhibit 'A' is not complete in that the schedule of advertisement and the specifications No. 447 referred to in said contract are not set forth in the copy so displayed as Exhibit 'A'."

Mr. Cooper: 3:

"That in and by the terms and conditions of said contract between said defendant, The Sanitation Corporation, and the United States of America the same was to be completed by the delivery of said needle valves by the said defendant. The Sanitation Corporation, to the United States of America 'F. O. B. Cars, Catasauqua, Pennsylvania' which is within the Eastern District of Pennsylvania."

Mr. Gourley: Paragraph 3 of the affidavit of defense:

"This defendant admits the averments in paragraph 3 of the Statement of Claim.

Mr. Cooper: 4:

"That in and by the terms and conditions of said contract between said defendant The Sanifation Corporation, and the United States of America, the latter agreed to pay to said defendant, The Sanitation Corporation, for said needle valves the sum of Twelve Thousand Five Hundred ($12,500.00) Dollars."

Mr. Gourley: Paragraph 4 of the affidavit of defense:

"This defendant admits the averments in paragraph 4 of the Statement of Claim."

[fol. 16] Mr. Cooper: 5:

"That in accordance with the terms and conditions of said contract between said defendant, The Sanitation Corporation, and the United States of America, and as required by the Act of Congress, commonly known as the Heard Act (Sec. 270 United States Code; Act of Congress of August 13th, 1894, Ch. 280, 28 Stat. 278 as amended by the Act of February 24th, 1905, Ch. 778, 33 Stat. 811; and by the Act of March 3rd, 1911, Ch. 231, Sec. 291, 36 Stat. 1167) said defendant, the Sanitation Corporation, was required to execute a penal bond with good and sufficient sureties in the sum of Six Thousand Two Hundred Fifty ($6,250.00) Dollars to the effect that said defendant, The Sanitation Corporation, would promptly make payment to all persons supplying it with labor and materials in the prosecution of the work provided for in said contract between said defendant, The Sanitation Corporation, and the United States of America, and that thereupon and accordingly said defendant, The Sanitation Corporation, as principal, and said defendant, The Globe Indemnity Company, as surety, did, in accordance with said contract and said Acts of Congress, execute and deliver their certain bond dated June 8th, 1926, of which a true and complete copy is hereto attached, marked Exhibit 'B' and hereby made a part hereof."

Mr. Gourley: Paragraph 5 of the affidavit of defense:

"This defendant admits the averments in paragraph 5 of the Statement of Claim."

Mr. Cooper: 6:

"That at the request of said defendant, The Sanitation Corporation, said plaintiff supplied said defendant, The [fol. 17] Sanitation Corporation, with labor and materials in the prosecution of the work provided for in said contract between said defendant, The Sanitation Corporation, and the United States of America and that at the request of said defendant, The Sanitation Corporation, said plaintiff manufactured said needle valves and/or caused the same to be manufactured and on behalf of and at the request of the said defendant delivered the same to the United States of America which accepted and used said needle valves as hereinafter set forth, and that said defendant, The Sanitation Corporation, promised and agreed to pay to said plaintiff therefor the sum of Fifteen Thousand Two Hundred Five ($15,205.00) Dollars. That the valves, labor and materials furnished by the plaintiff to the defendant, The Sanitation Corporation, as aforesaid were necessary for, and were actually used in the prosecution of carrying out and completion of said contract between the defendant, The Sanitation Corporation, and the United States of America, and that the same were duly accepted by the defendant, The Sanitation Corporation, and by the United States of America and used in the Project aforesaid."

Mr. Gourley: Paragraph 6 of the affidavit of defense:

"This defendant admits the averments of paragraph 6 of the Statement of Claim."

Mr. Cooper: 7:

"That the completion and final settlement of said contract between the defendant, The Sanitation Corporation, and the United States of America occurred on or about November 5th, 1927, at which time the United States of America made final settlement and payment to said defendant, The Sanitation Corporation, under said contract and for said valves."

[fol. 18] Mr. Gourley: Paragraph 7 of the affidavit of defense:

"This Defendant admits that the United States of America made final payment to the defendant, The Sanitation Corporation, under said contract for the said valves on or about November 5, 1927. This Defendant denies that final settlement of the said contract between the defendant, The Sanitation Corporation, and the United States of America occurred on or about November 5, 1927, and to the contrary avers that such final settlement was made on or about June 16, 1927, and prior to October 17, 1927, by the fixing administratively by the proper governmental authorities of the United States of America of the amount which the United States of America was finally bound to pay to the defendant, The Sanitation Corporation, under said contract."

Mr. Cooper: Now, of course, that paragraph of the affidavit of defense is not admitted, but I am reading it because we have an answer to some of these things, and I think it is best to get the whole thing on the record. Of course, we do not admit that that statement in the affidavit of defense is correct.

8. "On account of the said sum of Fifteen Thousand Two Hundred Five ($15,205.00) Dollars there was paid on account on June 1st, 1928, the sum of Two Thousand Seventy Dollars and Thirty Cents ($2,070.30) leaving a balance due of Thirteen Thousand One Hundred Thirty Four Dollars and Seventy Cents ($13,134.70) due for the price of the said valves, labor and materials furnished as aforesaid by the plaintiff to the defendant, The Sanitation Corporation, which said balance has not been paid to the said plaintiff although demand therefor has been made upon the said Sanitation Corporation, defendant, and payment refused. [fol. 19] Plaintiff further avers that demand has been duly made on the defendants herein for the payment of the sum of Six Thousand Two Hundred Fifty ($6,250.00) Dollars, and interest thereon, under the terms of the said bond, and payment thereof was refused by the said defendants."

Mr. Gourley: Paragraph 8 of the affidavit of defense:

"This defendant admits the averments in paragraph 8 of the Statement of Claim."

Mr. Cooper: 9:

"That no suit has been brought by the United States of America against either of the defendants upon said contract or upon said bond and that more than six (6) months have elapsed since the completion and final settlement of said contract between the defendant, The Sanitation Corporation, and the United States of America, and that the plaintiff, in accordance with the Statutes hereinabove referred to, has been furnished with a certified copy of said contract and said bond."

Mr. Gourley: Paragraph 9 of the affidavit of defense:

"This Defendant admits the averments in paragraph 9 of the Statement of Claim."

Mr. Cooper: 10:

"That a petition in involuntary bankruptcy was filed against the Sanitation Corporation, defendant, in the United States District Court for the Southern District of New York on September 20th, 1928, and in the said proceedings A. Bruce Bielaski was duly appointed receiver and qualified for the said office in accordance with the order of the said court."

[fol. 20] Mr. Gourley: Paragraph 10 of the affidavit of defense:

"This Defendant admits the averments in paragraph 10 of the Statement of Claim."

Mr. Cooper: 11:

"The plaintiffs, Steacy-Schmidt Manufacturing Company, claim of the defendants and each and all of them the sum of Six Thousand Two Hundred Fifty ($6,250.00) Dollars, together with interest thereon from February 25th, 1927."

Mr. Gourley: Paragraph 11 of the affidavit of defense:

"This Defendant denies that there is due the plaintiff from this defendant the amount of $6,250.00, together with interest thereon from February 25, 1927, or any other amount whatsoever."

Mr. Cooper: Now, you better read the new matter and I will read the answer, so we get that all on the record. I think there is new matter there, isn't there?

Mr. Gourley: Yes, new matter, defendant's new matter, paragraph 1:

"That on or about June 16, 1927, and prior to October 17, 1927, final settlement was made under the aforesaid contract between the defendant, The Sanitation Corporation, and the United States of America, by the fixing administratively by the proper governmental authorities of the United States of America of the amount which the United States of America was finally bound to pay to the [fol. 21] defendant, The Sanitation Corporation, under said contract, and that this suit was not commenced until October 17, 1928, which was after the expiration of the period of one year from and after the date of final settlement under the said contract as aforesaid, and that therefore, under the provisions of the Act of Congress, commonly known as the Hurd Act (Sec. 270, U. S. Code; Act of Congress Aug. 13, 1894, Ch. 280, 28 Stat. 278, as amended by the Act of Feb. 24, 1905, Ch. 778, 33 Stat. 811), the right of the plaintiff to bring suit upon the bond mentioned in the Statement of Claim as aforesaid has lapsed and that the plaintiff is without right to have or maintain this action against this Defendant and any and all liability of this Defendant to the plaintiff has ceased and determined."

Mr. Cooper: Now, this is the answer of the plaintiff to that new matter in the affidavit of defense:

"In answer to the new matter set forth in the Affidavit of Defense filed by the Globe Indemnity Company, Steacy-Schmidt Manufacturing Company, Incorporated, plaintiffs herein, deny that on or about June 16th, 1927, final settlement was made under the contract between the defendant, The Sanitation Corporation, and the United States of America, by fixing administratively by the proper governmental authorities of the United States of America of the amount which the United States of America was finally bound to pay to the defendant, The Sanitation Corporation, under the said contract and the plaintiffs aver that the said administrative settlement of the amount due was not

made until October 26th, 1927, and final payment thereon was made on November 5th, 1927, and the plaintiffs aver that the suit upon the said bond was brought within the proper time, as fixed by the Hurd Act and the amendments thereto and that the defendant is liable to the plaintiffs for [fol. 22] the amount claimed in this action."

I now offer in evidence, I don't want to take Your Honor's time to read them all, offer in evidence the originals of the papers which are attached to the plaintiff's statement of claim, duly certified by the United States of America under the Acts of Congress, and which contain all the statements which appear in the annex to the plaintiff's statement of claim. The originals, of course, were on file with the Government, and this is a certified copy from the Government of the originals that are in their possession. I offer that in evidence.

Mr. Ballard: Is that the contract and the bond?

Mr. Cooper: Yes.

Mr. Ballard: That is Exhibits A and B to your statement of claim.

(Certified copies of Construction Contract and Bond from the General Accounting Office, Washington, were marked Plaintiff's Exhibit 1. Copies follow:

PLAINTIFF'S EXHIBIT 1

"United States of America, General Accounting Office

Pursuant to the Act of June 10, 1921, 42 Stat. 24, I hereby certify that the annexed documents, numbered Z-1 to Z-9, inc., are true copies of the official documents now on file in the General Accounting Office in the following case: The Sanitation Corporation.

In witness whereof, I have hereunto set my hand and [fol. 23] caused the seal of the General Accounting Office to be affixed this 17th day of April, in the year 1928, at Washington.

(S.) Austin R. Ginn, Assistant Comptroller General of the United States. (Seal General Accounting Office.)

General Accounting Office form 7a.

(in writing)
JCS O 191020
card

(Stamped)

Jr

General Accounting Office

Department of the Interior 8
1
Bureau of Reclamation 4
6
Umatilla (McKay Dam) Irrigation Project 6

(Stamped)
General Accounting Office
Jun. 26, 1926
Civil Division

Construction Contract

This contract, entered into this 29th day of May, 1926, in pursuance of the act of June 17, 1902 (32 Stat., 388) and acts amendatory thereof or supplementary thereto, between the United States of America, hereinafter called the United States, represented by the officer executing this contract[1] x x x x x x x x x and the Sanitation Corporation [1]a corporation duly organized under the laws of the State of Delaware (xx) (x x x x x x) [fol. 24] x x x x x x x (x x) x x x x x x x x x x x x x x x x x x x x hereinafter called the contractor, its [1]x x x x x x x x, successors, and assigns;

2. Witnesseth, That the parties hereto do hereby mutually covenant and agree as follows:

3. The contractor, [1]under penalty of a bond conditioned upon full performance of this contract, will, according to attached advertisement, proposal, and specifications made

a part hereof, furnish and deliver f. o. b. cars Catasauqua, Pennsylvania, two (2) 48-inch balanced needle valves as

[1]Strike out any words that may not be applicable.

described under Item 1 of the Schedule of said Advertisement, and Specifications No. 447.

4. In consideration of such full performance, the contract shall be paid as provided in said specifications.

In witness whereof, the parties *have hereto* signed their names the day and year first above written.

The United States of America, by (S.) R. F. Walter, (Official Title:) Chief Engineer.

(Stamped:) Jun. 15, 1926.
(In writing:) J. R. A. H. C. G.

[fol. 25] (Two witnesses are required where the contractor is an individual or a partnership.)

The Sanitation Corporation, Contractor, by (S.) Wm. L. D'Olier, (Title:) President.

[1]P. O. address

Attest (S.) James M. Kelly, Secretary, 165 Broadway, New York, N. Y.

P. O. Address

P. O. Address

P. O. Address

P. O. Address

Approved: ————, 192-

[1]See Instructions, page 4 of this contract form.

PLAINTIFF'S EXHIBIT 1

Department of the Interior, Bureau of Reclamation

Bond

Know all men by these presents, That we the Sanitation Corporation, a corporation duly organized under the laws of the State of Delaware and doing business in New York City, County of New York and State of New York, principal, and Globe Indemnity Company, of New York, County [fol. 26] of New York and State of New York, and ——— ———, of ———, County of ——— and State of ———, Sureties, are held and firmly bound unto the United States of America in the sum of Six thousand two hundred fifty Dollars ($6,250.00), lawful money of the United States, for which payment, well and truly to be made, we bind ourselves and each of us, our, and each of our heirs, executors, administrators, and assigns, for and in the whole, jointly and severally, firmly by these presents.

Sealed with our seals and attested by our signatures, at New York, this 8th day of June, in the year of our Lord one thousand nine hundred and twenty-six.

The nature of this obligation is such that if the said principal, its successors and assigns, or any of them, shall, and do in all things well and truly observe, perform, fulfill, accomplish, and keep all and singular the covenants, conditions, and agreements whatsoever, which on the part of the said principal, its successors and assigns, are, or ought to be, observed, performed, fufilled, accomplished, and kept, comprised, or mentioned in certain articles of agreement, bearing date the 29th day of May, one thousand nine hundred and twenty-six between the said principal and the United States of America acting in this behalf by R. F. Walter, Chief Engineer, concerning the furnishing of two 48-inch balanced needle valves under Item I of the Schedule of Specifications No. 447—Umatilla (McKay Dam) project, according to the true intent and meaning of said articles of agreement, and shall promptly make payment to all persons supplying labor and materials for the prosecution [fol. 27] of the work provided for, then the above obligation to be void; otherwise to remain in full force and virtue.

In witness whereof the said principal and sureties have hereunto subscribed their hands and affixed their seals

(Name of company.)		(Principal and sureties sign and affix seals. See instructions.)
(Corporate Seal.)	The Sanitation Corporation	
Signed, sealed, and delivered in the presence of—	By (s) Wm. L. D'Olier President	
	Attest (s) James M. Kelly, Secretary	
	(Here state official character of party acting for corporation.)	
(Two witnesses to signature of each individual surety.)	Globe Indemnity Company (Seal) (P.O.address): 1 By (s) F. B. Murphy (P.O.address); 5 Title Resident Vice President (P.O.address); 3 Attest (P.O.address); 5 (s) Nora Murphy (Seal) Resident Asst. Secy (P.O.address); T	

**The clause printed in italics applies only to bonds under contracts which provide, in whole or in part, for construction or repair work on public works or buildings or for installation of machinery.

(See instructions page 4.)

(Do not permanently attach any papers to this bond unless additional affidavit of sureties or certificates of approval are required.)

[fol. 28] (See instructions on page 4.) (Stamped.)

Treasury Department, Office of the Secretary, Section of Surety Bonds, Division of Appointments

Jun. 25, 1926.

Examined, read, approved as to the within corporate surety.

(S.) J. E. Harper.

(In case of corporate sureties inclose statements required by paragraph 4 of instructions on page 4.)

7—293 c. Department of the Interior, Bureau of Reclamation. Bond for fulfillment of contract with the Sanitation Corporation for two 48-inch balanced needle valves. Spec. No. 447. Umatilla (McKay Dam) Project. Bond

dated June 8, 1926. Amount, $6,250.00. Jun. 15, 1926. Approved: R. F. Walter, Chief Engineer, Bureau of Reclamation. (In writing:) J.R.A. F.C.Y.

[fol. 29] STATE OF NEW YORK,
County of New York, ss:

On the 8" day of June, 1926, before me personally appeared Wm. L. Do'Lier, to me known, who being by me duly sworn, did depose and say, that he resides in the New York that he is the President of The Sanitation Corporation the corporation described in and which executed the above instrument; that he knows the seal of said corporation; that the seal affixed to said instrument was such corporate seal; that it was so affixed by order of the Board of Directors of said corporation, and that he signed his name thereto by like order.

(S.) Marie A. Ritter, Notary Public, Kings County. Kings Co. Clerk No. 157, Reg. No. 8174. New York Co. Clerk No. 336, Reg. No. 8299. Term Expires March 30, 1928.

F&S #1358.

OFFER IN EVIDENCE

Mr. Cooper: Agreement between counsel in this case, made May 22, 1931:

"Agreement

It is hereby agreed that this case may be tried by a Judge without a Jury.

It is further agreed that Paragraph 7 of the Statement of Claim be amended to read as follows:

"That the completion and final settlement of said contract between the Defendant, the Sanitation Corporation, and the United States of America, occurred on or about October 29, 1927, at which time the United States of America made final settlement, and that payment to said Defendant, the Sanitation Corporation, under said contract [fol. 30] and for said valves took place on or about November 5, 1927."

It is further agreed that Paragraph 7 of the Affidavit of Defense be amended to read as follows:

"This Defendant admits that the United States of America made final payment to the defendant, The Sanitation Corporation, under the said contract for the said valves on or about November 5, 1927. This Defendant denies that final settlement of the said contract between the defendant, The Sanitation Corporation, and the United States of America occurred on or about October 29th, 1927, and to the contrary avers that such final settlement was made on or about June 16, 1927, and prior to October 17, 1927, by the fixing administratively by the proper Governmental authorities of the United States of America of the amount which the United States of America was finally bound to pay to the defendant, the Sanitation Corporation, under said contract."

It is further agreed that copy of General Accounting Office Form #39, Certificate #0165447 and copy of letter form E. B. Finney, First Assistant Secretary of the Interior dated June 16, 1927, addressed to Claims Division, General Accounting Office, 5th and F Streets, Washington, D. C. as certified to this Court by the Assistant Comptroller General of the United States, may be offered in evidence as part of this case.

It is further agreed that the original copy of letter under date of April 9th, 1928, from Messrs. Black, Varian and Simon, Attorneys for the plaintiff, addressed to the Department of the Interior, and the original answer under date of April 17th, 1928, of the Department, may be offered in evidence with the same force and effect as if the same had been duly proven by the testimony of witnesses, [fol. 31] the same, however, to be subjected to objections by the defendants.

Copy of letter of April 9th, 1928, and copy of the original letter of April 17th, 1928, above mentioned, are hereto attached, as exhibits.

These papers which were duly certified, and show the method of settlement of this claim by the United States Government, are admitted, and we offer the same in evidence, calling the Court's attention to the fact that E. B. Finney, First Assistant Secretary of the Interior in the last paragraph of his report which was sent to the General Accounting Office makes this statement:

"The claim has received administrative examination, is approved for $8,899.30 and I recommend that the amount found due be paid from the Reclamation Fund—4 x 502;" and the subsequent certificate of settlement which was made by the General Accounting Office, in which it appears in the last paragraph:

"In view of the foregoing and the fact that the administrative office has not approved an extension of time under paragraph 11 of Specifications No. 447, it must be concluded that the claimant company is liable to the United States for liquidated damages for 163 calendar days delay at $25.00 per day;"

and at the foot:

"Amount certified herein paid by Treasurer's check as authorized by warrant,"

November 5, 1927.

I offer those in evidence.

(Certified copies of letter dated June 16, 1927, to Claims [fol. 32] Division, General Accounting office, Fifth and F Streets, N. W., Washington, D. C., from E. B. Finney, First Assistant Secretary of the Interior; and General Accounting Office Form 39, Certificate No. 0165447 were marked Plaintiff's Exhibit 2. Copies follow:

"United States of America, General Accounting Office

Pursuant to the Act of June 10, 1921, 42 Stat. 24, I hereby certify that the annexed documents, numbered C-1 to C-5, inc., are true copies of the official documents now on file in the General Accounting Office in the following case: United States of America to the use of Steacy-Schmidt Manufacturing Co., Inc., etc., v. The Sanitation Corporation, incorporated under the laws of Delaware, et al.

In witness whereof I have hereunto set my hand and caused the seal of the General Accounting Office to be affixed this 7th day of June, in the year 1930, at Washington.

(Sgd.) Austin R. Ginn, Assistant Comptroller General of the United States. (Seal.)

[fol. 33] PLAINTIFF'S EXHIBIT 2

Department of the Interior, Washington

Address only The Secretary of the Interior. (General Accounting Office, June 16, 1927, Received. Claims Division.)

(Received G. A. O. Jun. 16, 1927.)

Jun. 16, 1927.

Claims Division, General Accounting Office, Fifth & F Streets N. W., Washington, D. C.

GENTLEMEN: I am enclosing herewith for direct settlement claim of the Sanitation Corporation of New York City, stated in the sum of $12,974.30 (including item of $474.30 for extra work) for payment in full under its contract dated May 29, 1926, for furnishing two 48 inch balanced needle valves complete, for the McKay Dam, Umatilla Federal irrigation project, Oregon, under specifications No. 447, made a part of the contract. Release on contract is attached to the voucher.

The contractor agreed to deliver the valves on or before September 15, 1926. No automatic extension of time accrued in favor of the contractor under paragraph 31 of the specifications as explained in the Chief Engineer's letter of June 4, 1927, to the Commission of Reclamation, copy herewith.

Complete delivery was not made until February 25, 1927, involving a delay of 163 days for which liquidated damages are assessable under paragraph 33 of the specifications, at the rate of $25.00 per day.

The contractor has filed a written application for extension of time (number of days indefinite) claiming the delay was due to unavoidable causes beyond its control, [fol. 34] namely, (1) strike in the shop of sub-contractor (Davies & Thomas Co.) and (2) the inability of another sub-contractor (Steacy-Schmidt Mfg. Co.) to secure steel required by the specifications for certain studs, bolts and screws.

Enclosed for your consideration is the following correspondence relative to the delay and the extension requested:

Copy of telegram, May 26, 1926 from Acting Chief Engineer to contractor.

Original telegram, May 27, 1926 from contractor to chief engineer.

Copy of telegram, May 29, 1926 from acting chief engineer to contractor.

Copy of letter, June 1, 1926 from purchasing agent to contractor.

Copy of letter, June 24, 1926 from Chief Designing engineer to contractor.

Copy of letter, July 14, 1926 from Davies & Thomas Co. to contractor.

Copy of Letter, Aug. 2, 1926 from designing engineer to contractor.

Original letter Aug. 3, 1926 from contractor to chief engineer.

Copy of letter, Aug. 16, 1926 from chief engineer to contractor.

Copy of letter, Aug. 18, 1926 from acting designing engineer to inspector.

Original letter (undated) from L. K. Maires, Asst. Engr. to Chief Engineer.

Original inspector's report dated Aug. 25, 1926.

Original letter, Sept. 16, 1926 from L. K. Maires, Asst. Engr. to Chief Engr.

Copy of inspector's report dated Sept. 16, 1926.

Original letter, Sept. 15, 1926 from contractor to chief engineer.

[fol. 35] Copy of telegram Sept. 18, 1926 from chief engineer to contractor.

Original inspector's report, Sept. 21, 1926.

Copy of letter, Oct. 1, 1926 from chief engineer to contractor.

Original letter, Oct. 9, 1926 from Steacy-Schmidt Mfg. Co. to L. K. Maires.

Original telegram, October 13, 1926 from Steacy-Schmidt Mfg. Co. to Chief Engineer.

Copy of telegram, Oct. 14, 1926 from chief engineer to Steacy-Schmidt Mfg. Co.

Original Inspector's report, Oct. 21, 1926.

Original Letter, Oct. 30, 1926 from contractor to chief engineer.

Copy of telegram, Nov. 2, 1926 from Chief Engineer to Steacy-Schmidt Mfg. Co.

Original telegram, Dec. 7, 1926 from Steacy-Schmidt Mfg. Co. to chief engineer.

Copy of inspector's report, Nov. 7, 1926.

Original letter, Nov. 12, 1926 from Asst. Engineer Maires to chief engineer.

Original inspector's report, Nov. 12, 1926.

Original inspector's report, Nov. 17, 1926.

Original inspector's report, Nov. 20, 1926.

Original telegram, Dec. 7, 1926 from Steacy-Schmidt Mfg. Co. to chief engr.

Copy of Telegram, Dec. 7, 1926 from acting chief engineer to Steacy-Schmidt Mfg. Co.

Original inspector's report, Dec. 15, 1926.

Original letter, Dec. 16, 1926 from inspector to chief engineer.

Original inspector's report, Dec. 16, 1926.

Original letter, Dec. 17, 1926 from inspector to chief engineer.

Original inspector's report, Dec. 18, 1926.

Copy of letter, Dec. 20, 1926 from acting chief engineer [fol. 36] to contractor, with contractor's invoice dated April 20, 1927.

Original letter, Dec. 27, 1926 from inspector to chief engineer.

Original inspector's report, Dec. 28, 1926.

Original letter, Jan. 10, 1927 from inspector to Engineer C. M. Day.

Copy of letter, Jan. 12, 1927 from acting engineer to contractor.

Original Letter, Jan. 17, 1927 from contractor to acting chief engineer.

Original letter, Jan. 31, 1927 from inspector to chief engineer.

Original telegram Feb. 3, 1927 from inspector to chief engineer.

Original letter, Feb. 3, 1927 from contractor to chief engineer.

Copy of letter, Feb. 4, 1927 from inspector to contractor.

Copy of letter, Feb. 7, 1927 from acting chief engineer to contractor.

Copy of letter, Feb. 7, 1927 from inspector to chief engineer.

Original letter, Feb. 7, 1927 from Steacy-Schmidt Mfg. Co. to chief engineer.

Original letter, Feb. 11, 1927 from contractor to chief engineer.

Copy of telegram, Feb. 25, 1927 from chief engineer to Steacy-Schmidt Mfg. Co.

Original letter, Feb. 25, 1927 from Steacy-Schmidt Mfg. Co. to chief engineer.

Copy of letter, Feb. 26, 1927 from chief clerk to contractor.

Original telegram, Feb. 26, 1927 from Steacy-Schmidt Mfg. Co. to chief engineer.

Original letter, Feb. 26, 1927 from contractor to chief engineer.

[fol. 37] Original letter, March 1, 1927 from contractor to chief clerk.

Original letter, March 10, 1927 from contractor to chief clerk, with copy of contractor's invoice dated March 10, 1927.

Copy of letter, March 16, 1927 from chief clerk to inspector.

Original letter, March 19, 1927 from inspector to Engineer C. M. Day.

Original letter, March 21, 1927 from inspector to Chief Engineer.

Original letter, March 22, 1927 from contractor to chief clerk.

Copy of letter, March 20, 1927 from chief engineer to contractor.

Copy of letter, March 31, 1927 from chief clerk to contractor.

Original inspector's report, April 2, 1927.

Original letter, April 12, 1927 from contractor to chief clerk.

Original consent of surety dated April 20, 1927.

Original letter, April 20, 1927 from contractor to chief engineer.

Original letter, April 20, 1927 from contractor to chief engineer, with enclosures.

Original telegram, June 1, 1927 from contractor to chief engineer.

Copy of telegram, June 1, 1927 from chief engineer to contractor.

Original telegram, June 2, 1927 from contractor to chief engineer.

Copy of telegram, June 4, 1927 from chief engineer to contractor.

Copy of letter, June 4, 1927 from chief engineer to Commissioner.

[fol. 38] As shown by the correspondence no extension is recommended by the engineer whose determination, in accordance with the provisions of paragraph 11 of the specifications governing the allowance of extensions of time, "shall be final and conclusive".

The claim has received administrative examination, is approved for $8,899.30 and I recommend that the amount found due be paid from the Reclamation Fund—4 x 502.

Very truly yours, (Sgd.) E. B. Finney, First Assistant Secretary.

Inclosure No. 69473.
(Stamped: ——).
A true copy certified to from the record.
Attest

(S.) Leo A. Lilly, Deputy Clerk. (Seal.) Seal of the District Court of the United States, E. D. Penna.

6/23/30.

Certificate of Settlement

General Accounting Office, Form 39.
Certificate No. 0165447.
(Class:) ——

General Accounting Office, Bookkeeping Division

Int. Settlements and claims.
(Div. Bookkeeping and Warrants.)
Claim No. 0191020.
Paid Nov. 3, 1927. Wt. No. 1222.)

Washington, D. C., Oct. 26, 1927.

I certify that I have examined and settled the claim(s) of [fol. 39] The Sanitation Corporation, Graybar Building, Grand Central Terminal, New York, New York (Division of Bookkeeping and Warrants, L Oct. 31, 1927, received),

against the United States for furnishing and delivering two (2) 48-inch balanced needle valves, complete, for the McKay Dam, Umatilla Project, Oregon, in accordance with contract dated May 29, 1926, and Extra Work Order dated Dec. 20, 1926. This amount is accepted as full and final payment of all claims and demands arising out of contract of May 29, 1926, and Extra Work Order dated Dec. 20, 1926, payment whereof is accepted in absolute release and discharge of the United States. And find that the sum of eight thousand, eight hundred ninety-nine dollars and thirty cents is due from the United States to said claimant(s), payable from the appropriation(s) 4X502, Reclamation Fund, Special Fund; Claimed, $12,974.30; Deducted, $4,075.00; Payable $8,899.30.

There is deducted the sum of $4,075.00, representing the amount of liquidated damages accruing for failure to complete the work within the time specified in contract dated May 29, 1926.

The claimant company agreed to make complete delivery on or before Sept. 15, 1926; whereas complete delivery was not accomplished until Feb. 25, 1927, which resulted in a delay of 163 calendar days.

The claimant company contend that a portion of the above indicated delay was caused by a strike in the plant of the first subcontractor Davies and Thomas Company, Catasauqua, Pa. The evidence in the case establishes the fact that internal labor trouble developed at the plant of [fol. 40] the Davies and Thomas Co., during the latter part of April, 1926, and continued until the latter part of July, 1926.

The Davies and Thomas Company, by letter dated July 14, 1926, withdrew its quotation of June 25, 1926, for furnishing to the claimant company the two needle valves called for under contract of May 29, 1926. Thereupon the claimant company on July 19, 1926 placed an order with a second sub-contractor, Steacy-Schmidt Co., York, Pa., to furnish the needle valves.

In view of the fact that a strike existed at the plant of Davies and Thomas Company at the time the contract of May 29, 1926, was awarded the claimant company, the contractor could have avoided any possible delay incident to such strike by negotiating with another sub-contractor in

the beginning instead of waiting almost two months before placing its order with a second sub-contractor.

Under the contract of May 29, 1926, the claimant company was not obligated to award the subcontract to Davies and Thomas Co., because the latter company was not named in said contract, nor did the granting of the subcontract to Davies and Thomas Company form a consideration in making the award of May 29, 1926, to the claimant company.

The evidence also discloses the fact that although the claimant company placed its order with Steacy-Schmidt Co. on July 19, 1926, the latter company had been unable to secure certain materials as late as Sept. 7, 1926. The delay due to the inability of the second subcontractor to secure necessary materials is not such a delay which the contract of May 29, 1926, recognizes as excusable or unavoidable and can not be attributed to any of the causes specified therein.

The claimant company contends that it was further de- [fol. 41] layed because of the failure of the United States to make prompt inspections and tests of the materials at the plant of the second subcontractor. The evidence in the case fails to disclose any unreasonable delay on the part of the United States in making such inspections and tests.

In view of the foregoing and the fact that the administrative office has not approved an extension of time under paragraph 11 of Specifications No. 447, it must be concluded that the claimant company is liable to the United States for liquidated damages for 163 calendar days delay at $25.00 per day.

Issue warrant(s) and send same as above.

J. R. McCarl, Comptroller General, by (Sgd.) E. B. Hilley.

$8,899.30. ag. Posted Oct. 29, 1927.

To the Secretary of the Treasury (Division of Bookkeeping and Warrants. C-1 c".)

Amount certified herein paid by Treasurer's check as authorized by warrant, J, Nov. 5, 1927.

Treasurer, U. S.

Mr. Cooper: Do you still object to these April 9th letters?

Mr. Ballard: Yes Mr. Cooper, not at all as to the form, of course, in which they are offered, but I object to them

because they prove nothing but the date of payment, No-
[fol. 42] vember 5th. Now, the date of payment, November 5th, is averred in the pleadings, and admitted, and is already in the record, and I think as you have amended your pleadings you will agree with me that the date of payment is never an index of the date of settlement. I understand that the writer of the inquiry to Washington, that is, the writer of the first letter, hoped to get different information, but the reply that he got simply says that the date of payment was November 5th. I think, therefore, the letters are immaterial.

Mr. Cooper: There are a number of cases, if Your Honor please, which seem to show that where the United States Government undertakes itself to tell contractors what the date of settlement was that they are more or less bound by that if no intervening rights occur, and these letters, I think Your Honor could admit them and then throw them out if you finally conclude——

The Court: I will take them subject to the objection, surely, but what is the exact language of the Act? What does the Act say?

Mr. Cooper: I beg your pardon?

The Court: What does the Act of Congress say?

Mr. Ballard: Heard Act?

The Court: Yes, final settlement, or——

Mr. Cooper: Final settlement.

Mr. Ballard: Mr. Cooper, I have it here, as quoted in the Pieler case.

Mr. Cooper: That is old, that Pieler case. Your Honor, shall I read it to you, or shall I hand it to you?

[fol. 43] The Court: Just those words. Is it final settlement?

Mr. Ballard: If no suit should be brought by the United States within six months from the completion and final settlement of said contract then the person or persons supplying the contractor may sue on the bond; I am paraphrasing from then on.

The Court: Completion and final settlement?

Mr. Ballard: Completion and final settlement of said contract.

The Court: All right.

Mr. Cooper: I will read these letters and put them on the record, if Your Honor please.

The Court: All right.

Mr. Cooper: This is a copy of a letter written by Black, Varian and Simon on behalf of the plaintiff to the Depart ment of the Interior:

April 9th, 1928.

Department of the Interior, General Accounting Office

Re Steacy-Schmidt Manufacturing Company vs. The Sanitation Corporation

GENTLEMEN: Our client, Steacy-Schmidt Manufacturing Company of York, Pennsylvania, furnished certain material and labor to The Sanitation Corporation which had a contract with the Department of the Interior, Bureau of Reclamation, for two 48-inch needle valves for the McKay Dam, Umatilla Irrigation Project in Oregon under specifications number 447. We will enclose customary affidavit under the Heard Act and will appreciate it if you will promptly send us a certified copy of the contract and of the bond.

[fol. 44] Will you also kindly inform us as to the date of the 'completion and final settlement' of the contract between The Sanitation Corporation and the Department of the Interior.

Thanking you for the courtesy of an immediate reply, we are,

Very truly yours, Black, Varian and Simon.

HMS:SW.
Enc."

The answering letter from the General Accounting Office at Washington:

"General Accounting Office, Washington

R-P.

April 17, 1928.

Black, Varian and Simon, Attorneys and Counsellors, Court Square Building, 2 Lafayette Street, New York, N. Y.

GENTLEMEN: Receipt is acknowledged of your communication dated April 9, 1928, enclosing affidavit of John J.

Cadot, Vice-President of the Steacy-Schmidt Manufacturing Company.

In compliance with your request there are transmitted herewith certified photostat copies of contract dated May 29, 1926, between The United States of America and The Sanitation Corporation; bond dated June 8, 1926, and attachments.

You are advised that the final payment was made November 5, 1927.

For the Comptroller General of the United States:

Respectfully, John K. Willis, Chief Clerk.

Enclosures.

R. F. M."

[fol. 45] I think that is the plaintiff's case, if Your Honor please.

Plaintiff rests.

Mr. Ballard: Your Honor, the defendant has nothing to offer. The defendant contends, as I have no doubt Your Honor has gathered, that——

The Court: Well, you submit a general point, do you? Suppose you submit a general point.

Mr. Ballard: Well, I have here a number——

The Court: Well——

Mr. Ballard: I don't know just in what form points of this kind in this kind of case ought to be submitted.

The Court: I suppose requests for findings of law.

Defendant rests.

Testimony closed.

Reported by Everett G. Rodebaugh.

[fol. 46] IN UNITED STATES DISTRICT COURT

PLAINTIFF'S REQUEST FOR FINDINGS OF FACT AND CONCLUSIONS OF LAW

I

The Affidavit of Defense filed in this case admits the averments in Paragraphs 1 to 6, inclusive, and from 8 to

10, inclusive, and the Court, therefore, finds that the facts set forth in these paragraphs of the plaintiff's Statement of Claim are true and correct.

II

By an agreement filed, it is further admitted that the following correspondence passed between Messrs. Black, Varian and Simon, Attorneys for the plaintiff, and the Court finds that the letter of April 9th, 1928, addressed by the plaintiff's Attorney to the Department of the Interior and the reply thereto under date of April 17th, 1928, constitute the correspondence as admitted in the agreement between the parties to this suit. The following are copies of the letters referred to:

April 9th, 1928.

Department of the Interior, General Accounting Office, Washington, D. C.

Re Steacy-Schmidt Manufacturing Company vs. The Sanitation Corporation

GENTLEMEN: Our client, Steacy-Schmidt Manufacturing Company of York, Pennsylvania, furnished certain material and labor to The Sanitation Corporation which had a contract with the Department of the Interior, Bureau of Reclamation, for two 48-inch needle valves for the McKay Dam, Umatilla Irrigation Project in Oregon under specifications number 447. We will enclose customary affidavit under the Heard Act and will appreciate it if [fol. 47] you will promptly send us a certified copy of the contract and of the bond.

Will you also kindly inform us as to the date of the "completion and final settlement" of the contract between The Sanitation Corporation and the Department of the Interior.

Thanking you for the courtesy of an immediate reply, we are,

Very truly yours, Black, Varian and Simon.

HMS:SW.
Enc.

General Accounting Office, Washington

R-P. April 17, 1928.

Black, Varian and Simon, Attorneys and Counsellors, Court Square Building, 2 Lafayette Street, New York, N. Y.

GENTLEMEN: Receipt is acknowledged of your communication dated April 9, 1928, enclosing affidavit of John J. Cadot, Vice-President of the Steacy-Schmidt Manufacturing Company.

In compliance with your request there are transmitted herewith certified photostat copies of contract dated May 29, 1926, between The United States of America and The Sanitation Corporation; bond dated June 8, 1926, and attachments.

You are advised that the final payment was made November 5, 1927.

For the Comptroller General of the United States.

Respectfully, John K. Willis, Chief Clerk.

Enclosures.

R. F. M.

[fol. 48] III

By agreement of the parties two documents furnished by the Assistant Comptroller General of the United States regarding the question of the settlement with the United States of the claim of the Sanitation Corporation are admitted as evidence in this proceedings. The first document is in the form of a letter by the First Assistant Secretary of the Interior to the General Accounting office stating in part, "I am enclosing herewith for direct settlement claim of Sanitation Corporation of New York City" for $12,974.30 for needle valves for McKay Dam. "The claim has received administrative examination, is approved for $8,899.30, and I recommend that the amount found due be paid." The other document is in the form of a certificate signed by E. B. Hilley for the Comptroller General of General Accounting Office, reading in part, "I certify that I have examined and settled the claim of Sanitation Corporation" against the United States for the two needle valves and "find that the sum of $8,899.30 is due from the United States to said claimant." This certificate is dated Octo-

ber 26, 1927, and payment is certified to have been made November 5, 1927. It appears from the contents of these papers that the Department of the Interior did not intend to finally adjudicate the rights of the parties. The letter to the General Accounting Office clearly states that the claim is submitted to the Accounting Office for approval. It states that the claim is sent to the General Accounting Office "for direct settlement" indicating clearly that the settlement that was to be made between the government and the contractor was to be made by the General Accounting Office. On the other hand the certificate made by the General Accounting Office states specifically that the claim [fol. 49] has been "settled" by it. That certificate also makes a finding that there is a definite amount due from the United States to the claimant. The whole character of the letter and the certificate shows that the claim as sent to the General Accounting office was for inspection and approval by the General Accounting Office, all of the facts and information relating to certain deductions being given in full. On the other hand the certificate made by the General Accounting Office is in form a final certificate. It is not a submission of any matter to any other office, but sets forth the reasons why the General Accounting Office finds that there must be a reduction in the amount of the contractor's claim. From a reading of the two documents it was still within the power of the General Accounting Office to make a settlement of the maximum demanded should their consideration of the documents differ from that recommended by the Department of the Interior.

The Court, therefore, finds as a fact that there was no final settlement of the amount in dispute by the Department of the Interior and that the final settlement was made upon the action of the General Accounting Office of the Comptroller General and the Court, therefore, finds that this settlement was made on October 26th, 1927.

IV.

The court finds as a fact that the Acts provided for settlement of accounts against the government are as follows:

"All claims and demands whatever by the Government of the United States or against it * * * shall be settled and adjusted in the General Accounting Office." U. S.

Code, Title 31, Sec. 71; R. S. 236, June 10, 1921, c. 18, Sec. 305; 42 Stat. 24.

"Nothing in this chapter shall prevent the General Ac- [fol. 50] counting Office from suspending items in an account in order to obtain further evidence or explanations necessary to their settlement. The Secretary of the Treasury shall make regulations fixing the time of payment which shall expire before a warrant be issued in payment of an amount certified as provided in this section."

"Disbursing officers, or the head of any executive department, * * * may apply for and the General Accounting Office shall render his decision upon any question involving a payment to be made by them or under them, which decision, when rendered, shall govern such office in passing upon the account containing said disbursement." U. S. Code, Title 31, Sec. 74; July 31, 1894, c. 174, sec. 8, 28 Stat. 207; June 10, 1921, c. 18, Sec. 304, 42 Stat. 24.

"The Secretary of the Interior shall sign all requisitions for the advance or payment of monies out of the Treasury upon estimates or accounts for expenditures upon business assigned by law to his department; subject however, to adjustment and control by the proper accounting officers of the General Accounting Office." R. S. Sec. 444; June 10, 1921, c. 18, Sec. 304, 42 Stat. 24.

"The Auditor for the Interior Department shall receive and examine all accounts * * * of the Secretary of the Interior * * * and all other business within the jurisdiction of the Department of the Interior, and certify the balances arising thereon to the Division of Bookkeeping and Warrants and send forthwith a copy of each certificate to the Secretary of the Interior." July 31, 1894, c. 174, Sec. 7, 28 Stat. 206.

By the Act of June 10, 1921, c. 18, Sec. 304, 42 Stat. 24, "all powers and duties now conferred or imposed by law upon the comptroller of the Treasury or the six auditors of the Treasury Department * * * shall, so far as not [fol. 51] inconsistent with this Act be vested in and imposed upon the General Accounting Office and exercised without direction from any other officer." It would, therefore, seem that the authority given to the auditor as specified above has been transferred to the General Accounting Office, which shall exercise the same "without direction from any other officer."

Under the provisions of these Statutes, therefore, the General Accounting Office was the only office authorized and empowered to make a final settlement in behalf of the government and according to the documents submitted and the Statutes recited above this final settlement did not take place until October 26th, 1927, and the court, therefore, finds that to be the date on which the final settlement was made.

V

Under all the facts as set forth in the pleadings and in the papers and documents admitted in evidence, the court finds that the final settlement in this case took place on October 26th, 1927, and, therefore, the suit by the plaintiff in this case was brought within the proper time, as provided by the statute.

CONCLUSION OF LAW

(1) As it appears from the correspondence heretofore mentioned between the Attorneys for the plaintiff, under date of April 9th, 1928, and the Department of the Interior and the reply thereto of April 17th, by the Chief Clerk of the Comptoller General of the United States that the said Clerk advised the Attorneys that final payment was made November 5th, 1927, the Government is bound by the action of its representative and the time thus fixed in the said [fol. 52] correspondence is evidence of the fact that there was no settlement made in the matter until the adjustment of October 26th, 1927, and the Government is bound by the advices given to the Attorneys in this correspondence. American Bonding Co. vs. U. S. 233 Fed. 364 (1916).

(2) Under the facts and the statutes found by the Court as a matter of fact, the Court concludes that as a Finding of Law neither the Department of the Interior or its various bureaus has any authority under the Acts of Congress to make a final settlement of claims against the Government, but that such a final settlement must be made under the Acts, in the General Accounting Office, and the Court further finds as a matter of law that the date of final settlement in this case is the date on which the General Accounting Office finally approved the account in behalf of the Government.

This case comes definitely within the decision in Lumber Company vs. Jones, etc., 47 Fed. Rep. (2nd Series) 74, where the Court decided, on a similar state of facts, that there could be no final settlement until the General Accounting Office had approved the same.

(3) Under all the evidence in this case, the Court finds that the claim of the plaintiff has been established and that the final settlement took place on October 26th, 1927, and the plaintiff, is therefore, entitled to recover a verdict for the amount of their claim, $6,250.00, with interest from February 25th, 1927, and a verdict is, therefore entered for plaintiff in the sum of $—.

[fol. 53] IN UNITED STATES DISTRICT COURT

DEFENDANT'S REQUEST FOR FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Court is respectfully requested to make the following findings of fact:

1. On the 29th day of May, 1926, the United States of America entered into a contract with The Sanitation Corporation for the furnishing of two 48" needle valves for installation in the Umatilla Irrigation project, a correct copy of which contract in writing is attached to Plaintiff's Statement of Claim.

2. Under the terms of said contract The Sanitation Corporation was obliged to furnish a bond with surety for compliance with the terms and conditions of the contract and for payment of all persons supplying labor and materials for the prosecution of the work provided for, which bond was given with Globe Indemnity Company of New York as surety. A correct copy of said bond is attached to Plaintiff's Statement of Claim.

3. Prior to June 16, 1927 the valves referred to in the contract were completed and accepted by the United States of America through the Department of the Interior, Bureau of Reclamation, which Department was authorized to enter into the said contract and, consequently, to accept and approve performance thereunder.

4. On or by June 16, 1927, the claim of The Sanitation Corporation under said contract had received administra-

tive examination and was approved in the amount of Eight Thousand, Eight Hundred Ninety-Nine Dollars and Thirty Cents ($8,899.30) by the First Assistant Secretary of the Interior.

[fol. 54] 5. The date of final settlement under the contract was June 16, 1927.

6. This suit was instituted October 17, 1928 or more than one year after final settlement under the contract.

CONCLUSIONS OF LAW

The Court is respectfully requested to make the following Conclusions of Law:

1. The date of the completion of the contract involved in this case is not later than June 16, 1927.

2. The date of final settlement under said contract is June 16, 1927.

3. An action upon the bond involved in this case to have been brought in time should have been instituted and the writ issued on or before June 16, 1928.

4. This action having been instituted on October 17, 1928, there is no right of action in the Plaintiff.

5. Under all the evidence in this case and the law, the action must be dismissed.

Morris Chester, Frederic L. Ballard, Attorneys for Defendant.

IN UNITED STATES DISTRICT COURT

OPINION—SUR PLEADINGS AND PROOFS—Filed July 15, 1932

KIRKPATRICK, J.:

This is a suit by a sub-contractor upon a bond given under the Hurd Act (Act of August 13, 1894). If this suit [fol. 55] has been brought within one year after the "final settlement of said contract", the use-plaintiff is entitled to recover, because it is conceded that its contract has been fully performed and that the general contractor has not paid. The suit was begun on October 17, 1928 and the

sole question involved is whether the final settlement took place before or after October 17, 1927.

The pertinent facts are found as follows:

1. The general contractor was The Sanitation Corporation.

2. The sub-contractor had fully performed the work under his contracts, prior to June 16, 1927.

3. On June 16, 1927, the Department of the Interior, by the Secretary of the Interior (to whom the Act of June 17, 1902 had committed the authority for making the contract) wrote a letter to the General Accounting Office, in part as follows: "I am enclosing herewith for direct settlement claim of the Sanitation Corporation of New York City. * * * The claim has received administrative examination, is approved for $8,899.30 and I recommend that the amount found due be paid. * * *"

4. Apparently no further action was taken by any department of the government until October 26, 1927. On that day the General Accounting Office, by the Comptroller General, issued its "Certificate of Settlement" in the following language (in part): "I certify that I have examined and settled the claim(s) of the Sanitation Corporation * * * and find that the sum of eight thousand, eight hundred ninety-nine dollars and thirty cents is due from the United States to said claimant(s) * * * Claimed [fol. 56] $12,974.30; Deducted $4,075.00; Payable $8,899.30."

5. Thereafter on November 5, 1927, the amount so certified was paid to the general contractor by Treasurer's Check.

6. The letter of June 16, 1927 from the Department of the Interior to the General Accounting Office was intended to be and was an administrative determination of the amount due under the contract.

Comment: Plaintiff relies upon Lambert Lumber vs. Jones Engineering and Construction Company, 47 Fed (2d) 74, but in that case the letter of transmittal from the administrative department charged with the work (the Veterans' Bureau) to the General Accounting Office was entirely different. It read in part, "Examined in the sum of $10,975.39 and respectfully referred to the General Ac-

counting Office for examination, settlement and approve for payment in the amount found due. * * * (Obviously the word "approve" should be read "approval".) The examination of an account is certainly not final settlement, and it was the clear intent of the letter to pass along to the General Accounting Office the function of making final settlement.

In the case at hand the letter of transmittal says that the claim has received administrative examination, "is approved for $8,899.30", and it is recommended that the amount be paid. It is difficult to say what more the Secretary of the Interior could have done toward the final settlement of the claim. He had no right actually to order it paid by the Treasury and therefore merely recommended its payment, but he did, after examination, finally and unequivocally approve it. When he said that he was send-[fol. 57] ing the claim for "direct" settlement he probably had payment in mind, a step which all authorities agree is not final settlement within the meaning of the law. The conclusion which I have reached in the foregoing findings is generally in accord with that reached by the Circuit Court of Appeals for this circuit in United States vs. Pauling, 297 Fed. 65, and Mandel vs. United States, 4 Fed. 2d) 629.

Conclusions of Law

"1. The Budget and Accounting Act of June 10, 1921, does not prevent a final settlement, within the meaning of the Heard Act, from being made by the administrative department to which the work has been committed by law.

Discussion: In the Lambert case, this point was left undecided because the court in that case found that there had been no administrative determination before the claim reached the General Accounting Office. In the case now before the court there was such determination and the question must now be met and decided.

In Illinois Surety Company vs. Peeler, 240 U. S. 214, the Supreme Court decided that action by the Secretary of the Treasury approving the statement of a supervising architect, in charge of the construction of a building under the Treasury Department, of the amount finally due, recommending that a specified sum be charged against the contractor as damages and that a voucher be issued in its

favor for the balance, was final settlement of the contract within the meaning of the Hurd Act. This case was decided before the "Budget and Accounting Act of 1921 had been [fol. 58] passed, but the Act of March 3, 1817 was in force at the time, and its pertinent language is precisely the same as that of the Act of 1921 except that it committed the function of settling and adjusting accounts to the Treasury Department instead of to the General Accounting Office. Since the Treasury Department was also the department charged with doing the work, the bearing of the decision upon a case like the present, in which the work was done by a different department than that charged with settling the account, must be determined from its rationale rather than from the facts involved.

The decision in the Peeler case proceeds upon a recognition that making the administrative determination of the amount due is a function, separate and distinct not only from paying the amount but also from the function of finally authorizing it to be paid. The court said, "but it is apparent that the word 'settlement' * * * has a well-defined meaning as denoting the appropriate administrative determination with respect to the amount due. We think that the words 'final settlement' in the Act of 1905 had reference to the time of this determination when, so far as the government was concerned, the amount which it was finally bound to pay or entitled to receive was fixed administratively by the proper authority." If the court had in mind the final authorization of payment by the Treasury Department under the Act of 1817, it would have been natural for it to have specified the Treasury Department as the place where the final settlement was made. Throughout, however, the reference is always to "appropriate administrative determinaiton". The Treasury Department in the Peeler case acted in two capacities, first, as an administrative department charged with doing certain work and second, as an accounting department charged with settlement and adjustment of accounts. It was clearly indicated that the Court, throughout its dis- [fol. 59] cussion, had in mind the action of the Treasury Department in the first of these capacities as the action upon which "final settlement" was predicated.

The recent decision of the Circuit Court of Appeals for the Fourth Circuit in Consolidated Indemnity, etc., Company vs. Smoot & Company (recently decided and not yet

reported) presented a somewhat different phase of the question but is in accord with the view of the Peeler case just stated. In that case there had been final action by the War Department through its constructing quartermaster but no action by the General Accounting Office. The suit was brought not less than six months but within a year after action by the War Department. The question was not whether it had been brought too late but whether, in view of the absence of action in the General Accounting Office, it had been brought too soon. Quoting United States vs. Starr, 20 Fed. (2d) 803, the court said, "There may be a final settlement between the government and the contractor, so as to fix the rights of the creditor under the statute, notwithstanding the balance may be subject to change; for when the government has clearly indicated that it has no further claim against the surety, a final settlement within the purview of the act has taken place." "We think that when the government official charged with responsibility in the premises officially determines the balance due to or from the contractor and makes a record of such determination, this is a final settlement within the meaning of the Hurd Act, notwithstanding that the accounts of disbursing officers are subject to audit in the Comptroller General's office." No confusion need arise from the court's statement "Undoubtedly where the Comptroller General actually makes the administrative determination of the amount due, as in Lambert Lumber Com-[fol. 60] pany vs. Jones Engineering & Construction Company, 47 Fed. (2) 74, his determination is the settlement within the meaning of the act." That clearly means where the Comptroller General makes the only administrative determination, because the court referred to the Lambert case and the whole basis of that decision was that the department charged with the work had never made any administrative determination.

The second conclusion of law follows from the foregoing.

2. The action of the Department of the Interior of June 16, 1927, was final settlement of the contract within the meaning of the Hurd Act.

In addition to the findings of fact contained in the foregoing opinion the Court adopts as its findings the first, second, third, fourth, fifth and sixth requests for findings submitted by the defendant, together with the facts

averred in the admitted paragraphs of the statement of claim which are paragraphs one to six, and eight to ten inclusive, also the facts contained in the agreement between the parties filed March, 1921.

Judgment may be entered for the defendant.

By the Court:

W. H. Kirkpatrick, J.

IN UNITED STATES DISTRICT COURT

PRÆCIPE FOR JUDGMENT—Filed July 27, 1932

To the Clerk of said Court:

In accordance with opinion filed by the Court in the above entitled matter on July 15, 1932, please enter judg- [fol. 61] ment for Globe Indemnity Company, one of the defendants in the above entitled matter, and against the plaintiff.

(S.) Morris Cheston, (S.) Frederic L. Ballard, Attorneys for Defendant.

IN UNITED STATES DISTRICT COURT

Before Kirkpatrick, J.

JUDGMENT—Filed July 27, 1932

And now, July 27, 1932, in accordance with the Opinion of the Court and by præcipe filed, Judgment is hereby entered in favor of Globe Indemnity Company, defendant, and against the plaintiff, The United States of America, to the use of Steacy-Schmidt Manufacturing Company, Incorporated, etc.

By the Court.

Attest:

(S.) E. G. Johnson, Deputy Clerk.

IN UNITED STATES DISTRICT COURT

EXCEPTIONS—Filed July 28, 1932

This case having been tried on March 21st, 1932, by Judge without a Jury by agreement of Counsel, the Plain-

tiff and Defendant having submitted requests for Findings of Fact and Conclusions of Law to which the Court has filed an Opinion, "Sur Pleadings and Proofs", making certain Findings of Fact and Law and permitting a judgment for defendant which was entered July 22nd, 1932; the [fol. 62] plaintiff by its Attorney, Samuel W. Cooper, Esquire, excepts to the Findings and Order of the Court, as follows:

(1) To the Findings of Fact No. 6:

"The letter of June 16, 1927, from The Department of the Interior to the General Accounting Office was intended to be and was an administrative determination of the amount due under the contract."

(2) To the Conclusion of Law No. 1:

"The Budget and Accounting Act of June 10, 1921, does not operate to prevent a final settlement, within the meaning of the Hurd Act, from being made by the administrative department to which the work has been committed by law."

(3) To the Conclusion of Law No. 2:

"The action of the Department of the Interior of June 16, 1927, was final settlement of the contract within the meaning of the Hurd Act."

(4) To the adoption of defendant's Fifth and Sixth requests for Findings of Fact:

"5. The date of final settlement under the contract was June 16, 1927.

"6. This suit was instituted October 17, 1928, or more than one year after final settlement under the contract."

(5) To the Court's Order:

"Judgment may be entered for the defendant."

(6) The refusal of the Court to affirm plaintiff's Fifth request for Finding of Fact:

[fol. 63] "Under all the facts as set forth in the pleadings and in the papers and documents admitted in evidence, the Court finds that the final settlement in this case took place on October 26th, 1927, and, therefore, the suit by the

plaintiff in this case was brought within the proper time, as provided by the statute."

(7) To the refusal of the Court to affirm plaintiff's Third request for Conclusion of Law:

"Under all the evidence in this case, the Court finds that the claim of the plaintiff has been established and that the final settlement took place on October 26th, 1927, and the plaintiff is, therefore, entitled to recover a verdict for the amount of their claim, $6,250,00, with interest from February 25th, 1927, and a verdict is, therefore, entered for plaintiff in the sum of $—."

Samuel W. Cooper, Attorney for Plaintiff.

The above exceptions are allowed.

W. H. Kirkpatrick, Judge.

IN UNITED STATES DISTRICT COURT

PETITION FOR ALLOWANCE OF APPEAL—Filed Oct. 17, 1932

To the Honorable the judges of said Court:

The Petition of Steacy-Schmidt Manufacturing Company, Incorporated, the use plaintiff in the above entitled case, respectfully represents:

1. That it brought the above suit under the above term and number claiming it was entitled to recover of the de-
[fol. 64] fendants the sum of $6,250.00 with interest; that the case was tried by a Judge without a jury and that the Honorable W. H. Kirkpatrick filed an opinion making certain findings in favor of the defendant and judgment in favor of the defendant was entered thereon July 27th, 1932.

2. Your petitioner is advised by counsel and verily believes that it has a just claim against the defendants and that the finding of the court and the judgment should have been in favor of the plaintiff and that a review of the proceedings will so show.

Wherefore your petitioner prays that an appeal be allowed from the judgment of your Honorable Court to the United States Circuit Court of Appeals.

Steacy-Schmidt Manufacturing Company, Inc., by
Samuel W. Cooper, Attorney.

IN UNITED STATES DISTRICT COURT

ORDER ALLOWING APPEAL

And now, this 15th day of Oct., A. D. 1932, upon consideration of the foregoing Petition and upon motion of Samuel W. Cooper, Esquire, Attorney for the plaintiff, it is ordered and decreed that an appeal be allowed to the United States Circuit Court of Appeals from the judgment entered in favor of the defendant Globe Indemnity Company, July 27th, 1932.

Plaintiff to furnish bail in the amount of $250.00.

Kirkpatrick, J.

[fol. 65] IN UNITED STATES DISTRICT COURT

ASSIGNMENTS OF ERROR—Filed Oct. 18, 1932

1. The Learned trial Court erred in making its Sixth finding of fact, to which an exception was filed by and allowed to the plaintiff:

"6. The letter of June 16, 1927, from The Department of the Interior to the General Accounting Office was intended to be and was an administrative determination of the amount due under the contract."

2. The Learned trial Court erred in making its First conclusion of law, to which an exception was filed by and allowed to the plaintiff:

"1. The Budget and Accounting Act of June 10, 1921, does not operate to prevent a final settlement, within the meaning of the Hurd Act, from being made by the administrative department to which the work has been committed by law."

3. The Learned trial Court erred in making its Second conclusion of law, to which an exception was filed by and allowed to the plaintiff:

"2. The action of the Department of the Interior of June 16, 1927, was final settlement of the contract within the meaning of the Hurd Act."

4. The Learned trial Court erred in confirming the defendant's Fifth and Sixth request for finding of fact, to

which an exception was taken by and allowed to the plaintiff, said request being as follows:

"5. The date of final settlement under the contract was June 16, 1927."

"6. This suit was instituted October 17, 1928, or more than one year after final settlement under the contract."

[fol. 66] 5. The Learned trial Court erred in entering the following order, to which an exception was duly taken and allowed:

"Judgment may be entered for the defendant."

6. The Learned trial Court erred in refusing to confirm plaintiff's Fifth request for finding of fact, to which an exception was duly taken and allowed, said request being as follows:

"5. Under all the facts as set forth in the pleadings and in the papers and documents admitted in evidence, the Court finds that the final settlement in this case took place on October 26th, 1927, and, therefore, the suit by the plaintiff in this case was brought within the proper time, as provided by the statute."

7. The Learned trial Court erred in refusing to confirm plaintiff's Third request for a conclusion of law, to which an exception was filed by and allowed to the plaintiff, said request being as follows:

"3. Under all the evidence in this case, the Court finds that the claim of the plaintiff has been established and that the final settlement took place on October 26th, 1927, and the plaintiff is, therefore, entitled to recover a verdict for the amount of their claim, $6,250.00, with interest from February 25th, 1927, and a verdict is, therefore, entered for plaintiff in the sum of $—."

S. W. Cooper, Attorney for Plaintiff.

[fol. 67] IN UNITED STATES DISTRICT COURT

PRÆCIPE FOR TRANSCRIPT OF RECORD ON APPEAL—Filed November 2, 1932

Clerk of the United States District Court, Post Office Building, Philadelphia.

DEAR SIR: In the above case will you kindly certify for the record on appeal the following:

Docket Entries.

Statement of Claim and exhibits.

Affidavit of Defence and New Matter of Globe Indemnity Company.

Answer of plaintiff to New Matter.

Stenographer's record of the trial, except for the following pages which are to be omitted:

Pages 18, 19, and 20 consisting of a form of affidavit not filled in and instructions for the execution of the contract.

Bottom half of page 24 beginning with "Affidavits of individual sureties", pages 25, 26, 27, 28, 29, and 30 and the upper part of page 31 ending with the words, "if required by existing law", said pages consisting of blank forms of affidavits and directions and instructions for the execution of the bond.

Last half of page 33, pages 34, 35, 36, 37, 38 and first half of page 39 ending with the words, "commission expires March 30, 1927".

Plaintiff's exhibits as contained in the stenographer's record consisting of the following:

1. Certified copy of the General Accounting Office form No. 39, Certificate No. 0165447.

[fols. 68 & 69] 2. Certified copy of letter of June 16, 1927, First Assistant Secretary of Interior to General Accounting Office.

3. Copy of the letter of April 9, 1928, from attorneys to Department of Interior.

4. Answer to the same dated April 17, 1928.

5. Agreement of counsel of May 22, 1931.

6. Bond of the defendant, Globe Indemnity Company.

7. General contract between United States of America and Sanitation Corporation.

Plaintiff's request for findings of fact and conclusions of law.

Defendant's request for findings of fact and conclusions of law.

Opinion and findings of fact and law of Kirkpartrick, J.

Plaintiff's exceptions.

Assignments of error.

Petition for appeal and order thereon.

Yours very truly, S. W. Cooper, Atty. for Plffs.

G:D.

Clerk's certificate to foregoing transcript omitted in printing.

IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT, MARCH TERM, 1933

No. 5025

UNITED STATES to Use of STEACY-SCHMIDT MFG. CO., INC., Appellant,

vs.

GLOBE INDEMNITY CO., Appellee

And afterwards, to wit, the 9th day of March, 1933, come the parties aforesaid by their counsel aforesaid, and this case being called for argument sur pleadings and briefs, before the Honorable Joseph Buffington, Honorable J. Warren Davis, and Honorable J. Whitaker Thompson, Circuit Judges, and the Court, not being fully advised in the premises, takes further time for the consideration thereof.

And afterwards, to wit, on the 10th day of July, 1933, come the parties aforesaid by their counsel aforesaid, and the Court, now being fully advised in the premises, renders the following decision:

IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT, MARCH TERM, 1933

No. 5025

THE UNITED STATES OF AMERICA to the Use of STEACY-SCHMIDT MANUFACTURING COMPANY, INCORPORATED, etc., Appellant,

vs.

GLOBE INDEMNITY CO., Appellee

Upon Appeal from the District Court of the United States for the Eastern District of Pennsylvania

Before Buffington, Woolley, and Thompson, Circuit Judges

OPINION—Filed July 10, 1933

THOMPSON, Circuit Judge:

This is an appeal from a judgment of the District Court for the Eastern District of Pennsylvania. The Sanitation

Corporation entered into a contract with the United States to furnish the latter with two needle valves required by the Department of the Interior for a public irrigation project. In accordance with the provisions of the Hurd Act (40 U. S. C. A. 270), the Sanitation Corporation, as principal, and the Globe Indemnity Corporation, as surety, executed a bond with the condition that the Sanitation Corporation pay promptly all persons supplying it with labor and materials. The Steacy-Schmidt Manufacturing Company, Inc., supplied the valves and all labor and materials necessary in the prosecution and completion of the Sanitation Corporation's contract with the United States. An involuntary petition in bankruptcy was filed against the Sanitation Corporation. The greater part of the sum due the Steacy-Schmidt Manufacturing Company, Inc., was still unpaid. On October 17, 1928, the Steacy-Schmidt Manufacturing Company, Inc., brought suit on the bond to its own use, in the name of the United States as legal plaintiff. Jury trial was waived by written stipulation and the case heard by the District Judge. This appeal is from the judgment in favor of one of the defendants, the Globe Indemnity Company.

The Hurd Act limits the subcontractor's right of action to one year. It provides:

"Any person or persons entering into a formal contract with the United States for * * * the prosecution and completion of any public work * * * shall be required, before commencing such work, to execute the usual penal bond, with good and sufficient sureties, with the additional obligation that such contractor or contractors shall promptly make payments to all persons supplying him or them with labor and materials in the prosecution of the work provided for in such contract; * * * If no suit should be brought by the United States within six months from the completion and final settlement of said contract, then the person or persons supplying the contractor with labor and materials shall * * * be furnished with a certified copy of said contract and bond, upon which he or they shall have a right of action, and shall be, and are hereby, authorized to bring suit in the name of the United States in the district court of the United States in the district in which said contract was to be performed and exe-

cuted, irrespective of the amount in controversy in such suit, and not elsewhere, for his or their use and benefit, against said contractor and his sureties, and to prosecute the same to final judgment and execution: Provided, That where suit is instituted by any of such creditors on the bonds of the contractor it shall not be commenced until after the complete performance of said contract and final settlement thereof, and shall be commenced within one year after the performance and final settlement of said contract, and not later: * * *"

The plaintiff contends that final settlement did not take place until October 26, 1927, and that its right of action did not expire until October 26, 1928. The defendant contends that the date of final settlement was June 16, 1927, and that the right of action of the subcontractor expired June 16, 1928. It therefore is essential to determine the date of final settlement.

In Illinois Surety Co. v. Peeler, 240 U. S. 241, the Supreme Court held that final settlement, within the meaning of the Act, does not depend upon final payment but upon the final administrative determination by the proper authority of the amount due. In the instant case the defendant assumes that the Department of the Interior was the proper authority to make final settlement. It relies upon a letter dated June 16, 1927, written by the First Assistant Secretary of the Department of the Interior to the Claims Division, General Accounting Office, as proof that final settlement occurred on that day. The letter begins: "I am enclosing herewith for direct settlement the claim of the Sanitation Corporation", and concludes: "The claim has received administrative examination, is approved for $8,899.30 and I recommend that the amount found due be paid from the Reclamation Fund 4 x 502."

Correspondence relative to the claim was enclosed for the consideration of the General Accounting Office which issued its certificate of settlement signed by the Comptroller General. The certificate read:

"I certify that I have examined and settled the claim of the Sanitation Corporation * * * and find that the sum of eight thousand eight hundred ninety-nine dollars is due from the United States to said claimant, payable from

the appropriation 4 x 502 * * * In view of the foregoing * * * it must be concluded that the claimant company is liable to the United States for liquidated damages for 163 calendar days delay at $25.00 per day. Issue warrant and send same as above."

The Comptroller General, in making his finding, relied upon the correspondence submitted by the Department of the Interior.

It may be conceded that, prior to the enactment of the Budget and Accounting Act of 1921, the Department of the Interior was the appropriate administrative branch to make final settlement for work done for that Department. The Budget and Accounting Act, however, unquestionably empowers the General Accounting Office to make all settlements on behalf of the government. The pertinent sections read:

"All powers and duties which on June 30, 1921, were conferred or imposed by law upon the Comptroller of the Treasury or the six auditors of the Treasury Department * * * shall * * * be vested in and imposed upon the General Accounting Office and be exercised without direction from any other officer. The balances certified by the Comptroller shall be final and conclusive upon the executive branch of the Government. * * *" (31 U. S. C. A. 44.)

"All claims and demands whatever by the Government of the United States or against it * * * shall be settled and adjusted in the General Accounting Office." (31 U. S. C. A. 71.)

"Nothing in this chapter shall prevent the General Accounting Office from suspending items in an account in order to obtain further evidence or explanations necessary to their settlement. The Secretary of the Treasury shall make regulations fixing the time which shall expire before a warrant is issued in payment of an account certified as provided in this section and section 72 of this title.

* * * * * * *

"Disbursing officers, or the head of any executive department, * * * may apply for and the General Ac-

counting Office shall render his decision upon any question involving a payment to be made by them or under them, which decision, when rendered, shall govern said office in passing upon the account containing said disbursement." (31 U. S. C. A. 74.)

This Act empowers the General Accounting Office to make all settlements and to render decisions upon any question involving a payment to be made by disbursing officers or by the head of any executive department. It provides that the balances certified by the Comptroller General shall be final and conclusive. The decision in Lambert Lumber Co. v. Jones Engineering & Construction Co., Inc., 47 F. (2d) 74, certiorari denied, 283 U. S. 842, sustains the view that the General Accounting Office is authorized to settle claims.

We are of the opinion that the General Accounting Office in the instant case was charged with the duty of making final settlement and performed that duty, as evidenced by its certificate of settlement issued in October, 1927. The plaintiff's suit therefore was brought within the one year allowed by the Hurd Act.

The judgment of the court below is reversed, and the cause remanded for further proceedings in accordance with this opinion.

WOOLLEY, Circuit Judge, dissenting:

It should be noted that in the Lambert Lumber Company case the department charged with the work did not make an administrative determination of the claim but passed it on to the General Accounting Office which, doubtless, in that situation, had authority finally to act upon the matter. Distinguishing the dicta from the decision in the Lambert case and adhering to the law of the Peeler case, I believe the Budget and Accounting Act of 1921 did not repeal or change the provisions of the Hurd Act requiring an appropriate administrative determination of a claim before suit. I would find in this case that the Department of the Interior, having been charged with the work, made such a determination or settlement, and the action of the General Accounting Office was not a settlement of the contractor's claim but was merely an accounting transaction whereby

the Office, before directing payment, went over, examined, checked and audited the settlement previously made by the Department; that in this case the settlement so made by the Department was the one contemplated by the Hurd Act and that, in consequence, the plaintiff-contractor brought his suit too late.

A true Copy. Teste:

——— ———, Clerk of the United States Circuit Court of Appeals for the Third Circuit.

IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT, MARCH TERM, 1933

No. 5025

THE UNITED STATES OF AMERICA to the Use of STEACY-SCHMIDT MANUFACTURING CO., INC., etc., Appellant,

vs.

GLOBE INDEMNITY CO., Appellee

On Appeal from the District Court of the United States for the Eastern District of Pennsylvania

This cause came on to be heard on the transcript of record from the District Court of the United States for the Eastern District of Pennsylvania and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, reversed, with costs, and the cause remanded for further proceedings in accordance with the opinion of this Court.

Philadelphia, July 10, 1933.

J. W. Thompson, Circuit Judge.

Endorsements: 5025. Order reversing judgment with costs, etc. Rec'd & filed July 10, 1933. Wm. P. Rowland, Clerk.

UNITED STATES OF AMERICA,
Eastern District of Pennsylvania,
Third Judicial Circuit, sct.:

I, Wm. P. Roland, Clerk of the United States Circuit Court of Appeals for the Third Circuit, do hereby certify the foregoing to be a true and faithful copy of the original Transcript of Record and proceedings in this Court in the case of United States to use of Steacy-Schmidt Mfg. Co., Inc., Appellant, vs. Globe Indemnity Co., Appellee, No. 5025, on file, and now remaining among the records of the said Court, in my office.

In testimony whereof I have hereunto subscribed my name and affixed the seal of the said Court, at Philadelphia, this 28th day of July, in the year of our Lord one thousand nine hundred and thirty-three, and of the Independence of the United States the one hundred and fifty-eighth.

Wm. P. Rowland, Clerk of the U. S. Circuit Court of Appeals, Third Circuit. (Seal United States Circuit Court of Appeals Third Circuit.)

[fol. 77] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 23, 1933

The peition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on cover: File No. 38,022. U. S. Circuit Court of Appeals, Third Circuit. Term No. 419. Globe Indemnity Company, petitioner, vs. The United States of America to the use of Steacy-Schmidt Manufacturing Company, Incorporated. Petition for writ of certiorari and exhibit thereto. Filed September 1, 1933. No. 419, O. T., 1933.